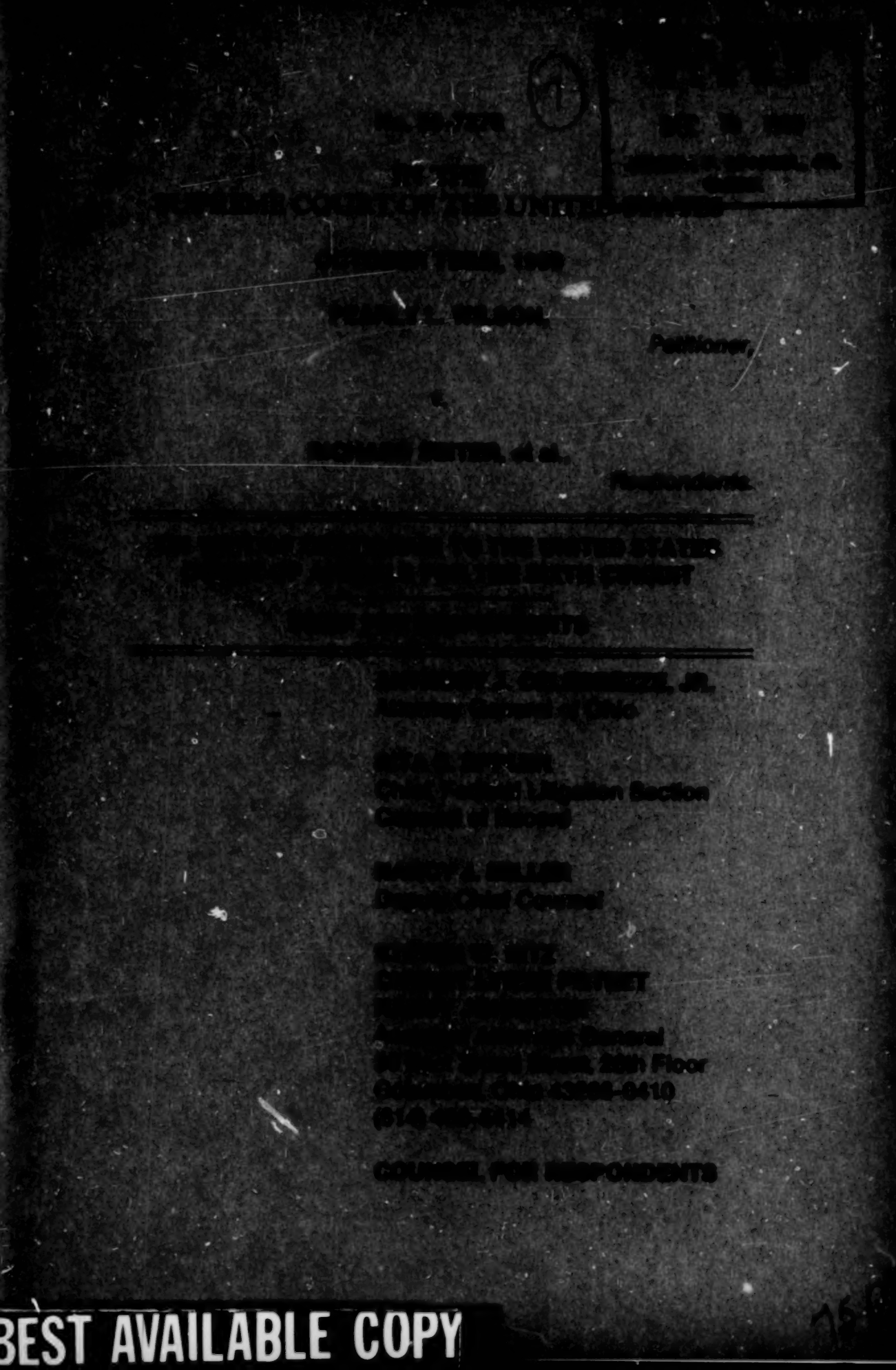

LIST OF PARTIES

Respondent, Richard P. Seiter, listed in this action as the Director of the Ohio Department of Rehabilitation and Correction has been succeeded in his official capacity by George W. Wilson. Respondents otherwise agree with the List of Parties as presented by Petitioner.

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No. 89-7376

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

PEARLY L. WILSON,

Petitioner,

v.

RICHARD SEITER, et al.,

Respondents.

BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

Hocking Correctional Facility (HCF) is a medium security institution in Nelsonville, Ohio. (J.A. 47).[1] The facility was originally constructed in 1956 and served as a tuberculosis hospital until its conversion to a medium security prison in 1983. (J.A. 40, 47). The prisoners at HCF are housed in two large dormitories, each accommodating approximately 140 prisoners, and an honor dormitory housing forty-six prisoners. (J.A. 40). The dormitories resemble army barracks, with long rows of bunk beds and lockers for each inmate's personal possessions. (J.A. 49).

HCF houses older inmates who are allowed considerable freedom of movement within the institution.[2] (J.A. 48, 49).

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[1] References to (J.A.) are to the appropriate pages in the Joint Appendix. References to (A.) are to the appropriate pages in the Appendix to the Brief for Respondents.

[2] The unit manager of HCF confirmed that older inmates are placed at HCF for their protection. (J.A. 42, Friend Affidavit at ¶26). For example, Inmate Vinson was seventy-seven years old when he signed an affidavit in support of Petitioner's motion for summary judgment. (J.A. 19).

Inmates may choose to watch television, including subscription cable television and the Home Box Office channel, in one of the large television rooms, exercise in the gymnasium, walk around the yard, play billiards on the pool table, read in the prison library, visit guests in the visitors' lounge, or further their education in supervised continuing education classes. (J.A. 48, 49). Inmates are required to report to their bunks only at night and for several periodic counts during the day. (J.A. 49).

Petitioner, Pearly L. Wilson,[3] brought this action under 42 U.S.C. § 1983 against Richard P. Seiter,[4] then Director of the Ohio Department of Rehabilitation and Correction,[5] and Carl Humphreys,[6] then warden of HCF. (J.A. 3-4). Seiter and Humphreys were alleged to have inflicted cruel and unusual punishment on Petitioner in contravention of the Eighth Amendment to the United States Constitution due to the allegedly unfit conditions at HCF. Petitioner and the second plaintiff, Everett Hunt, Jr., sought damages from the two defendants in their individual capacities in the amount of

[3] The second named plaintiff, Everett Hunt, Jr., is no longer confined at HCF and is not a party to this petition. Furthermore, this case was not pursued as a class action.

[4] Mr. Seiter is no longer Director of the Ohio Department of Rehabilitation and Correction. At the time Mr. Seiter served as Director he was a United States Bureau of Prisons employee on loan to Ohio pursuant to the Intergovernmental Personnel Act of 1970, 5 U.S.C. §§ 3371-3376. Mr. Seiter returned to the United States Bureau of Prisons in 1988. Given Mr. Seiter's employment with the federal government, the participation of the United States as *amicus curiae* is curious.

[5] Mr. George W. Wilson is the current Director of the Ohio Department of Rehabilitation and Correction. No substitution of parties has been made in this case as Respondents have been sued in their individual as well as their official capacities.

[6] Mr. Humphreys is no longer warden of HCF. Carole Shiplevy is the current HCF warden.

$1.8 million dollars,[7] as well as declaratory and injunctive relief. (J.A. 8-9, Amended Complaint, VII ¶¶4-5.)

Petitioner challenged virtually every condition of confinement at HCF. Petitioner's Amended Complaint alleged: overcrowding (J.A. 4, Amended Complaint ¶ 9), excessive noise (J.A. 4, Amended Complaint ¶ 9), insufficient locker storage space (J.A. 4-5, Amended Complaint ¶ 10), inadequate heat in the winter (J.A. 5, Amended Complaint ¶ 11), inadequate ventilation in the summer (J.A. 5, Amended Complaint ¶ 12), unclean restrooms (J.A. 5, Amended Complaint ¶¶ 14, 15, 16), inmate assignments to dormitories based on improper classifications (J.A. 6, Amended Complaint ¶ 17), and unsanitary dining room and food preparation (J.A. 6, Amended Complaint ¶ 18).

Petitioner filed a motion for summary judgment supported by affidavits signed by five other HCF inmates. (J.A. 1, Journal Entry of 11-10-86). The motion and affidavits raised additional claims of insect infestation and inadequate cooling in the summer. (J.A. 34, 35). Respondents filed a memorandum contra Petitioner's summary judgment motion supported by an affidavit of Homer Friend, the unit manager[8] of Petitioner's dormitory at HCF. (J.A. 40). Mr. Friend's affidavit documents specific measures taken by HCF to keep the noise level down, to heat and ventilate the facility, to maintain cleanliness in the restrooms and food service area, and to exterminate insects in the institution. Mr. Friend also described the HCF

[7] Petitioner and the second named plaintiff each sought $900,000. This amount included $600,000 in punitive damages and $300,000 in compensatory damages. (J.A. 8-9, Amended Complaint, VII, ¶¶4,5). State officials are not indemnified for punitive damages. Ohio Rev. Code Ann. §9.86 (Page 1990) (A.1).

[8] Unit management is an administrative model based on decentralized decision making authority. The unit manager is part of a professional team which works within a particular HCF dormitory. The unit management system attempts to resolve problems expeditiously by allowing inmates to raise personal or institutional concerns immediately. The team includes a social worker and someone from the team is on duty seven days per week for at least twelve hours per day. (J.A. 50).

health screening procedures and the HCF policy for transferring mentally ill inmates to psychiatric programs at other institutions. (J.A. 40-42).

Respondents then filed a cross-motion for summary judgment. (J.A. 1, Journal Entry of 4-16-87). The cross-motion for summary judgment included the affidavit of the health care administrator at HCF who described the medical and psychiatric services provided at HCF, reviewed the medical history of Petitioner, and stated that there were no records of inmates suffering from excessive heat or food poisoning, and that the number of cold-related diseases was normal for this age group. (J.A. 43-44). In addition, he noted that the inmates and prison employees "eat the same food prepared in the same kitchen." (J.A. 43). The motion was also supported by an affidavit of staff counsel for the Ohio Judicial Conference, authenticating an article written for a Judicial Conference publication describing his visit to HCF on October 23, 1986. (J.A. 45-52).

The district court denied Petitioner's motion for summary judgment, granted Respondents' motion for summary judgment and dismissed the action. (J.A. 53). The court found that Petitioner had failed to present a genuine issue of material fact, for the pleadings and affidavits revealed that Petitioner had been provided with "at least the minimal civilized measure of life's necessities" and that the HCF officials did not demonstrate "obdurate or wanton behavior." (J.A. 59).

Petitioner appealed to the Sixth Circuit Court of Appeals, which appointed counsel.[9] The court of appeals affirmed the lower court's decision, holding that Petitioner's allegations of overcrowding, housing with mentally ill inmates, and inadequate cooling, even if true, were insufficient to establish constitutionally violative conditions. *Wilson v. Seiter,* 893 F.2d 861, 865 (6th Cir.), *cert. granted,* 111 S. Ct. 41 (1990) (J.A.

[9] The Sixth Circuit Court of Appeals brief was prepared by the appointed counsel.

68). The court found that summary judgment was properly granted on Petitioner's other allegations, for Petitioner's affidavits failed to present sufficient evidence to allow a reasonable jury to conclude that Respondents had acted obdurately and wantonly. *Wilson v.Seiter,* 893 F.2d at 867 (J.A. 74).

Petitioner then sought a writ of certiorari from this Court. This Court granted the petition and the motion to proceed *in forma pauperis* on October 1, 1990. *Wilson v. Seiter,* 111 S. Ct. 41 (1990).

SUMMARY OF ARGUMENT

To show that conditions of confinement inflict cruel and unusual punishment in violation of the Eighth Amendment an inmate must demonstrate that the conditions: (1) constitute punishment, (2) seriously deprive him of basic human needs, and (3) are inflicted by prison officials acting with a wanton and obdurate state of mind. If an inmate fails to present sufficient evidence to create a genuine issue of fact regarding any one of these essential elements the prison officials are entitled to summary judgment. This test strikes the needed balance, protecting inmates' constitutional rights while allowing prison officials flexibility to deal with the practical difficulties of operating our nation's prison systems.

Conditions of confinement can be scrutinized under the Eighth Amendment only if those conditions themselves constitute punishment. A condition of confinement constitutes punishment only if the condition is imposed with an intent to punish or if the condition is not rationally related to an alternate purpose or is excessive in relation to the alternate purpose. *Bell v. Wolfish,* 441 U.S. 520 (1979). None of the conditions of confinement Petitioner complains of constitute punishment. All of the conditions are rationally related to legitimate security, administrative, and fiscal concerns.

The Court in *Rhodes v. Chapman,* 452 U.S. 337 (1981), evaluated a claim that conditions of confinement (double

celling) constituted cruel and unusual punishment. The *Rhodes* Court found that prison officials were entitled to judgment because the inmates failed to show an essential element of their Eighth Amendment claim. The inmates' failure to demonstrate that they were deprived of "the minimal civilized measure of life's necessities" was fatal to their constitutional claim.

Some lower courts, relying on *Rhodes*, have failed to consider prison officials' state of mind when ruling on conditions claims, and have considered only whether the conditions meet the minimal civilized measure of life's necessities. Because the *Rhodes* Court found that inmates were provided with minimal standards of human decency, it went no further in discussing the elements of an Eighth Amendment violation. However, the Court had previously decided Eighth Amendment liability should not be imposed without fault. Prison officials must have acted with a culpable state of mind to be found liable for violating an inmate's constitional rights. *Estelle v. Gamble*, 429 U.S. 97 (1976).

The Court in *Whitley v. Albers*, 475 U.S. 312 (1986), directed lower courts to consider a state of mind analysis in all Eighth Amendment cases. *Whitley* marked a return to the Court's historical treatment of Eighth Amendment cases, holding that officials can not be found to have inflicted cruel and unusual punishment unless it is shown that they acted with an obdurate and wanton state of mind.

The foregoing test announced by the *Whitley* Court and utilized by the Sixth Circuit requires an inmate to do more than make conclusory allegations of cruel and unusual punishment. It requires the inmate to show a genuine issue of fact that officials' conduct has been persistent and malicious in maintaining prison conditions that deprive an inmate of basic human needs. This test protects the rights of both the inmates and prison officials, while conserving judicial resources.

The Sixth Circuit properly included state of mind as an element of Eighth Amendment claims challenging conditions

of confinement. The Sixth Circuit affirmed summary judgment in favor of the prison officials, finding that there was no evidence that the officials had acted wantonly and obdurately. The Sixth Circuit interpreted wanton and obdurate as persistent malicious cruelty.

The use of persistent malicious cruelty to evidence wantonness and obduracy in an Eighth Amendment conditions case strikes a needed balance. Requiring less would permit liability for an isolated act or omission resulting from inadvertence or error in good faith. This analysis permits prison officials' behavior to be examined in light of their knowledge of deficient conditions, actions taken to cure the deficient conditions, and any barriers to action, financial or otherwise, that would have an impact on the ability to cure the deficient conditions. Moreover, the subjective nature of claims pertaining to conditions of confinement mandate the need for a test giving wide deference to prison officials charged with the responsibility of operating our nation's prison systems.

Obduracy and wantonness can be shown in a conditions case only where an official acted with a degree of malice. Where, as here, prison officials continuously endeavor to maintain decent living conditions within a facility, wantonness and obduracy can not be found. Respondents' efforts to maintain decent living conditions at Hocking Correctional Facility would preclude even a finding of deliberate indifference. Ignoring the prison officials' efforts to provide decent human living conditions in penal institutions and, instead, looking solely at the conditions in existence at the facility would, in effect, impose a strict liability standard for prison conditions claims.

Ohio does not seek to operate prisons without regard to the constitutional rights of prisoners. Indeed, Hocking Correctional Facility is radically different from the inhumane institutions that cause concern for inmates' health and safety. Ohio merely seeks a meaningful test that will allow claims that do not rise to a constitutional level to be resolved without resort to a federal court trial.

ARGUMENT

I. THE EIGHTH AMENDMENT CRUEL AND UNUSUAL PUNISHMENT CLAUSE PROHIBITS CONDITIONS OF CONFINEMENT THAT CONSTITUTE PUNISHMENT, DEPRIVE INMATES OF BASIC HUMAN NEEDS, AND ARE CAUSED BY OFFICIALS ACTING WITH A WANTON AND OBDURATE STATE OF MIND

"The deplorable conditions and draconian restrictions of some of our Nation's prisons" have caused the federal courts rightly to "condemn these sordid aspects of our prison systems." *Bell v. Wolfish,* 441 U.S. 520, 562 (1979). This case, however, is "light years removed from the torture, cruel deprivations, and sadistic punishment with which the Cruel and Unusual Punishment Clause is concerned. *See Hutto v. Finney,* 437 U.S. 678, 681-84 and nn. 3-6 (1978)." *Cody v. Hillard,* 830 F.2d 912, 915 (8th Cir. 1987) (en banc), *cert. denied,* 485 U.S. 906 (1988). *Hutto v. Finney* described conditions that were characterized as a "dark and evil world completely alien to the free world." 437 U.S. at 681.[10] Regardless of what standards are used to analyze conditions cases, nothing in the record in this case even remotely approaches the conditions of confinement that fall below the constitutional standards enunciated in *Rhodes v. Chapman,* 452 U.S. 337 (1981) and *Whitley v. Albers,* 475 U.S. 312 (1986).

A. Prison Conditions Are Not Cruel And Unusual Punishment Where They Provide The Minimal Civilized Measure Of Life's Necessities And Where Conditions Do Not Inflict Wanton And Unnecessary Pain

[10] "[C]onditions [in *Hutto v. Finney*] included: use of five (5) foot long leather straps to whip inmates for minor offenses, use of a device to administer electrical shocks to very sensitive parts of an inmate's body and use of inmate guards authorized to use deadly force against "escapees" who therefore could murder another inmate with practical impunity. 437 U.S. at 682 nn. 4-6." *Cody v. Hillard,* 830 F.2d at 915.

Petitioner claims that the court of appeals erroneously applied a "malicious and sadistic" intent requirement in support of its affirmance of the district court's entry of summary judgment in Respondents' favor. Petitioner's argument is disingenuous at best for, as is shown in part B, *infra* pp. 26-27, the court of appeals did not utilize a "malicious and sadistic" intent standard in its review of the lower court's decision. Additionally, the court of appeals correctly analyzed the district court's decision within the framework of the restrictions of the Eighth Amendment and determined that conditions at HCF did not constitute cruel and unusual punishment. *Wilson v. Seiter,* 893 F.2d 861 (6th Cir. 1990). (J.A. 62).

1. An Eighth Amendment claim should first be evaluated to determine whether punishment has been inflicted

Evaluating a conditions case under the guidelines of the Eighth Amendment is a difficult task because that provision, and the majority of cases explaining its application, deal with "punishment" in the traditional sense. As this Court advised, the American draftsmen, copying the English Bill of Rights, were "primarily concerned, however, with proscribing 'tortures' and other 'barbarous' methods of punishment." *Gregg v. Georgia,* 428 U.S. 153, 170 (1976) (citing Granucci, *Nor Cruel and Unusual Punishments Inflicted: The Original Meaning,* 57 Calif. L. Rev. 839, 842 (1969)). The focus of many Eighth Amendment cases, therefore, is whether punishment is "cruel and unusual" while the underlying assumption is that the challenged act constitutes punishment.

However, detention in and of itself, is not punishment in the constitutional sense. Furthermore, "not every disability imposed during. . .detention amounts to 'punishment' in the constitutional sense. . . ." *Bell v. Wolfish,* 441 U.S. at 537.[11]

[11] *Bell v. Wolfish* involved pretrial detainees who had not been adjudged guilty of any crime but who were detained to insure their attendance at trial. The parties conceded that detention, by itself, did not constitute punishment so as to give rise to a Fifth Amendment due process claim.

Inquiry into whether a governmental act constitutes punishment involves many questions, including whether the act involves an affirmative disability or restraint, has historically been regarded as punishment, promotes the goals of retribution and deterrence, is directed toward behavior that is a crime, is directed toward an alternative purpose (other than punishment), or appears excessive in relation to its alternate purpose. *Id.* at 537-38.

Therefore, while confinement in prison is subject to Eighth Amendment scrutiny, official acts that do not inflict pain are not punishment and are therefore not forbidden, or even regulated, by the Eighth Amendment. *Rhodes v. Chapman,* 452 U.S. at 348. Conditions of confinement, and specific restrictions on inmates, are not necessarily punishment and, if not, do not invite inquiry under the Eighth Amendment. Some conditions are easy to identify as punitive, such as solitary confinement or loss of privileges. But a court must first decide whether a governmental act is taken for the purpose of punishment or for some other legitimate governmental purpose before moving on to a determination of whether the act is cruel and unusual.

> Absent a showing of an expressed intent to punish on the part of detention facility officials, that determination [of whether the act constitutes punishment] generally will turn on "whether an alternative purpose to which (the restriction) may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned (to it).

Bell v. Wolfish, 441 U.S. at 538 (quoting *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 168-69 (1963)).

The first level of analysis, therefore, should be whether the conditions of Petitioner's confinement constitute the punishment at issue. Petitioner does not contend that Respondents exhibited an intent to punish him by imposing the conditions at HCF of which he complains. Therefore, those conditions do not constitute punishment if they are

rationally related to an alternative purpose and are not excessive in relation to that purpose. The inquiry must "spring from constitutional requirements and . . . judicial answers to them must reflect that fact rather than a court's idea of how best to operate a detention facility." *Bell v. Wolfish,* 441 U.S. at 539.

Many of Petitioner's complaints stem from the fact that inmates at HCF are housed in open dormitories rather than in private cells with their own restroom facilities. Petitioner complains that inmates are double-bunked, have personal space of less than 50 square feet, and that there is a high noise level caused by other inmates. (J.A. 4, Amended Complaint ¶ 9). He complains that he is subjected to the odor of other inmates' bodies and of the common restrooms because of their proximity to the bunks. (J.A. 34, Wilson affidavit ¶ 9). He complains that the common restroom facilities are inadequately cleaned (J.A. 5, Amended Complaint ¶ 13-16) even though they are thoroughly cleaned twice a day and spot cleaned on an as needed basis. (J.A. 41, Friend affidavit ¶ 15).

Under the standards set out in *Bell v. Wolfish,* 441 U.S. at 537-38, none of the above conditions even constitute punishment. The conditions are rationally related to the decision to house inmates in large dormitories. Clearly the decision to use a dormitory facility is one the Court should defer to prison administrators. The above complaints reflect Petitioner's personal discomfort with the fact that he is housed in a dormitory with one hundred forty inmates. However, the conditions are not excessive in relation to the decision to house inmates in a dormitory facility and therefore do not constitute punishment. The prison administrators' decisions about how to deal with the problems attendant to a dormitory environment[12] should receive deference from

[12] In addition to requiring the restrooms be cleaned twice a day, the prison administrators require that the kitchen area and dining area be cleaned after every meal, assign 57 inmates to kitchen duty, contract with an exterminator twice a month, and require that inmates who work around food wear hats and plastic gloves. (J.A. 41-42). The Court should defer to the decision of the prison officials to utilize inmate labor to clean the facility and prepare and serve the food.

the Court. Since the conditions Petitioner complains of are related to the alternative purpose of operating a dormitory detention facility with prison labor and are not excessive with regard to this purpose, the acts of Respondents do not constitute punishment subject to Eighth Amendment scrutiny.

Similarly, Petitioner does not argue that he has been subjected to temperature extremes intentionally so as to punish him for the crime for which he was incarcerated or an infraction committed in the prison. Furthermore, other than indicating that he has been periodically subjected to 95° temperatures in the summertime,[13] Petitioner does not specify the temperature extremes inside the building, other than to claim that they are "cold" and "frigid." (J.A. 33-34). Being subjected to 95° temperatures in the summertime is a condition encountered by many Ohio residents who do not live in air conditioned homes. Certainly the decision to install air conditioning springs from legitimate governmental economic interests attendant to the effective management of a detention facility and cannot be considered to be punishment. "[A] state's interest in reasonably limiting the cost of a detention facility is a legitimate governmental objective in the framework of the *Bell v. Wolfish* standard . . . ." *Hamm v. DeKalb County,* 774 F.2d 1567, 1573 (11th Cir. 1985), *cert. denied,* 475 U.S. 1096 (1986). Petitioner has never claimed that the building is not heated in the wintertime, merely that the heating and insulation are inadequate. Furthermore, Petitioner's subjective opinion that temperatures are "cold" and "frigid" when considered along with the objective fact that the heaters are serviced and in good working order (J.A. 41) cannot support a claim that the air temperature constitutes punishment.

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[13] Petitioner does not claim that *he* has suffered from heat related rashes or breathing difficulty but, rather, that *other* inmates have suffered from these physical ailments. As previously noted, this case is not a class action and, therefore, Petitioner may not allege the injuries of other inmates in support of his cause of action.

2. Conditions of confinement that constitute punishment must be objectively evaluated to determine whether an inmate has been seriously deprived of basic human needs

Because conditions of confinement do not fit neatly into the definition of "punishment," the Court looks at the general principles enunciated in other Eighth Amendment cases in order to establish a framework in which to evaluate prison conditions cases. In *Rhodes v. Chapman* the Court emphasized that, because of the flexibility of the Eighth Amendment, courts must look at " 'evolving standards of decency that mark the progress of a maturing society.' " 452 U.S. at 346 (quoting *Trop v. Dulles,* 356 U.S. 86, 101 (1958) (plurality opinion)). It is no longer only those punishments that are physically barbarous which are prohibited but those which "involve the unnecessary and wanton infliction of pain." *Gregg v. Georgia,* 428 U.S. at 173. "Unnecessary and wanton" means punishment that is "totally without penological justification." *Id.* at 183.

Conditions that constitute cruel and unusual punishment involve the "serious deprivations of basic human needs" and "deprive inmates of the minimal civilized measure of life's necessities." *Rhodes v. Chapman,* 452 U.S. at 346. A court's determination of this issue should not be based on the subjective views of judges and, even though a court's judgment will "be brought to bear on the question of the acceptability of a given punishment," that judgment "should be informed by objective factors to the maximum possible extent." *Rhodes v. Chapman,* 452 U.S. at 346 (citations omitted).

Assuming the truth of Petitioner's objective allegations, he has not been deprived of the minimal measure of life's necessities nor has he suffered a serious deprivation of basic human needs. Taken at the furthest extreme, Petitioner claims that he lives in a crowded, noisy dormitory that is too cold in the winter and too hot in the summer, that the inmates who clean the restrooms do not do a very good job and the inmates who provide food service do not keep things

clean enough. Petitioner also claims that the inmate population includes sick prisoners, both physically and mentally, because the rules on inmate classification have not been followed. Brief of Petitioner at 3.

Contrast the above allegations with the situation present in *Hutto v. Finney*, 437 U.S. 678, where the prison officials admitted that the conditions of "punitive isolation" constituted cruel and unusual punishment. At the Arkansas prison, from four to eleven prisoners were "crowded into windowless 8' x 10' cells containing no furniture other than a source of water and a toilet that could only be flushed from outside the cell." *Id.* at 682. Prisoners with hepatitis and venereal disease were celled together and their bedding was jumbled together each morning, and indiscriminately returned at night. They were fed a 1,000 calorie a day diet of " 'grue', a substance created by mashing meat, potatoes, oleo, syrup, vegetables, eggs, and seasoning into a paste and baking the mixture in a pan." *Id.* at 682-683. *See supra* p.8 n.10. For punishment purposes, inmates were sentenced to these punitive isolation cells with no reprieve for lengthy, indeterminate periods of time. *Id.*

In contrast, Petitioner was provided with considerable freedom within a facility that includes a lounge for snacking and visitation, (J.A. 48) special television rooms, (J.A. 40), gymnasium, pool room, weight room and prison library (J.A. 49). Inmates must periodically report to their bunks for a head count but otherwise are allowed to choose their own activities. (J.A. 49). Certainly Petitioner's claims that "[e]ven though C dorm appears to be clean, it is not" and that HCF extermination is inadequate as there are wasps, yellow jackets, roaches, mice, mosquitoes and spiders (J.A. 35), does not involve the serious deprivation of human needs standard set out in *Rhodes*.

3. An Eighth Amendment claim must also be evaluated to determine whether prison officals acted with a culpable state of mind, for to hold otherwise would impose strict liability on prison officials

Petitioner claims that the Court in *Rhodes* rejected any kind of intent or state of mind analysis for a conditions case. Even though, Petitioner admits, an analysis of intent may be appropriate for other Eighth Amendment cases such as a claim for failure to provide medical care, *Estelle v. Gamble*, 429 U.S. 97 (1976),[14] or excessive use of force, *Whitley v. Albers*, 475 U.S. 312, Petitioner argues that the Court should not incorporate any state of mind test into the Eighth Amendment analysis of prison conditions. Petitioner urges closer scrutiny and less deference to state officials in an analysis of prison conditions because, he claims, they do not involve split-second decisions regarding safety nor must they be weighed against other important governmental interests. Brief of Petitioner at 12-13. Furthermore, Petitioner claims that there is a need for a uniform national standard against which the conditions in all prisons may be evaluated. Brief of Petitioner at 24. Petitioner's approach disregards the officials' state of mind. This effectively imposes strict liability on prison officials, requiring them to maintain minimal standards of human decency as defined by the federal courts

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[14] The "deliberate indifference" standard of *Estelle v. Gamble* unquestionably involves an examination of the state of mind of the prison official. Nonetheless, Petitioner inconsistently argues that a state of mind analysis has no place in a conditions case. Brief of Petitioner at 23-26. Not only is Petitioner's argument in his merits brief internally inconsistent, but Petitioner actually concedes in his Petition For A Writ of Certiorari that a state of mind analysis was appropriate in all Eighth Amendment cases, including conditions cases; Petitioner merely takes issue with the applicable state of mind standard.

> In this case, the Sixth Circuit failed to apply *Whitley* correctly. The Sixth Circuit failed to recognize that the "obdurate and wanton" state of mind requirements of *Whitley* for all Eighth Amendment violations encompass both the "deliberate indifference" and the "malicious and sadistic intent" standards. Which of the two "obdurate and wanton" state of mind requirements applied depends on the circumstances.

Petition For Writ Of Certiorari at 32-33. Petitioner's argument that the Court should abandon a state of mind analysis altogether for conditions cases was not a part of the Questions Presented For Review in the Petition and should not be heard by this Court. *Sup. Ct. R.* 14.1(a). (A.2).

and organizations such as the American Correctional Association and the American Public Health Association. See Brief of Amicus Curiae American Public Health Association.

Contrary to Petitioner's argument, the Court in *Rhodes* did not reject a state of mind analysis for conditions cases. A more reasonable reading of the decision, especially in light of the fact that it was decided in a short time period that began with *Estelle v. Gamble* and ended with *Whitley v. Albers*, is that the state of mind of the prison officials was never an issue in *Rhodes* because the Court found that the conditions at the Southern Ohio Correctional Facility (SOCF) satisfied the minimal civilized measure of life's necessities. Therefore, respondents could not show one of the necessary elements of the constitutional claim. The Court admonished that the determination of cruel and unusual punishment should not be merely the product of the subjective view of judges. *Rhodes v. Chapman*, 452 U.S. at 346. This is certainly not a rejection of the use of an inquiry into the state of mind of the officials in conditions cases. Indeed the Court in *Rhodes v. Chapman* looked to "Eighth Amendment precedents for the general principles that are relevant to a State's authority to impose punishment for criminal conduct" *id.* at 345, including the "unnecessary and wanton infliction of pain." *Id.* at 346. The Court did not, as Petitioner suggests, formulate a new test for conditions cases.

The state of mind requirement is an essential component of any meaningful test for conditions that do not involve a threat to bodily integrity, pain, injury, or loss of life. Use of a state of mind analysis logically assists in differentiating between conditions that are unconstitutional from those "restrictive and even harsh" conditions permitted by *Rhodes*. 452 U.S. at 347.

Analysis of Eighth Amendment cases has historically involved a discussion of the official's intent, and still does today. In *State of Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947), the Court rejected a convicted murderer's claim that it would constitute cruel and unusual punishment to execute him after a first attempt had failed. "There is no

purpose to inflict unnecessary pain nor any unnecessary pain involved in the proposed execution." *Id.* at 464. Furthermore, as previously noted, *Estelle v. Gamble* and *Whitley v. Albers* both utilize a state of mind analysis. In *Graham v. Connor*, 109 S. Ct. 1865 (1989), the Court compared the Eighth Amendment prohibition against cruel and unusual punishment with the Fourth Amendment prohibition of unreasonable searches and seizures. The Court recited the fact that subjective state of mind is relevant to an Eighth Amendment claim as established hornbook law: "the terms 'cruel' and 'punishment' clearly suggest some inquiry into subjective state of mind, whereas the term 'unreasonable' does not". *Id.* at 1873.[15]

There is no reason to disregard prison officials' state of mind when a federal court reviews claims that general prison conditions are unconstitutional, but to consider state of mind when reviewing claims that medical treatment was withheld or that excessive force was used. Refusal to provide medical treatment can "produce physical 'torture or a lingering death'" or, in a less severe case "result in pain and suffering." *Estelle v. Gamble*, 429 U.S. at 103 (quoting *In Re Kemmler*, 136 U.S. 436, 447 (1890), *overruled by, Gregg v. Georgia*, 428 U.S. 153 (1976)). Even more clear is that use of force can cause "severe [physical] damage . . .and mental and emotional distress." *Whitley v. Albers*, 475 U.S. at 317. Furthermore, officials' failure to protect an inmate can also result in pain and suffering and even death. *Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556 (1st Cir.), *cert. denied*, 488 U.S. 823 (1988). The discomfort caused by conditions of confinement do not merit closer review and less deference than decisions of prison officials involving acts or omissions that are life or health threatening. Petitioner's argument that a claim that general conditions of confinement should be subject to broader scrutiny by the Court is not consistent

[15] In a separate concurring opinion, Justices Blackmun, Brennan and Marshall did not take issue with the majority's conclusion that the Eighth Amendment requires a subjective state of mind analysis. *Graham v. Connor*, 109 S. Ct. at 1873-74.

with the language and purpose of the Eighth Amendment.

Petitioner claims that the cases cited in footnote 17 of *Rhodes v. Chapman*, 452 U.S. at 352, support his claim that the Court rejected a state of mind analysis in conditions cases. Petitioner argues that the cited circuits relied only on objective conditions at the detention facilities to determine that those conditions constituted cruel and unusual punishment. Petitioner's claim is misplaced; this Court merely referred to the cases in footnote 17 as examples of state institutions that were subject to federal court orders.

Petitioner further argues that in *Ramos v. Lamm*, 639 F.2d 559 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981), the court rejected the State's arguments that they "had made good faith efforts to remedy the constitutional violations." Brief of Petitioner at 25. But the "efforts" referenced in the court's decision were actually efforts to construct and open a new facility, which facility was not yet in operation. Of course construction of a new prison would not be relevant to the conditions at an older existing facility. Similarly, Petitioner's citation to *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974) does not support his claim that all good faith efforts of prison officials are irrelevant in a conditions claim. In *Gates*, the court merely held that improvement efforts made after suit was filed would not be cause to deny relief to the inmates because there was no assurance that improvements would be maintained:

> "When defendants are shown to have settled into a continuing practice . . .courts will not assume that it has been abandoned without clear proof. . . . It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption."

Id. at 1321 (quoting *United States v. Oregon Medical Society*, 343 U.S. 326, 333 (1952)).

Respondents do not ask, nor did the court of appeals hold, that it would be appropriate to defend themselves by arguing that they would provide another, better facility in the future (*Ramos*) or that, after suit, they cleaned things up at HCF (*Gates*). Instead, Respondents defended themselves on the basis that prior to the filing of Petitioner's lawsuit they had taken best efforts and provided decent living conditions for the inmates at HCF. This state of mind consideration is appropriate in a conditions case just as it is in other Eighth Amendment cases.

Petitioner also claims that closer federal court scrutiny is appropriate because prison security is not an issue in a prison conditions case. This claim is undermined by the nature of Petitioner's own complaints. For example, the decision to utilize inmate labor as food service and custodial workers implicates a decision to have fewer, non-guard employees in the facility on a daily basis. This, and the decision to exterminate twice a month instead of more frequently, reflects concern about the security of the facility, the personal safety of non-inmates, and the potential for smuggling contraband intc the institution. Indeed, Petitioner's Amended Complaint and affidavits in this action provide numerous examples of conditions claims that involve security questions for which prison administrators must be provided wide latitude. Two of the more obvious examples are: classification issues, (J.A. 6, Amended Complaint ¶ 17), and security of fire exits and "crash gates," (J.A. 13, Cassidy Affidavit ¶ 18), (J.A. 18, Griffin Affidavit ¶ 16), (J.A. 21, Vinson Affidavit ¶ 12), (J.A. 25, Bock Affidavit ¶ 18).

Moreover, security is not the only countervailing governmental interest implicated in a conditions case. The decision to house inmates in a dormitory environment implicates important government interests. Furthermore, the financial interests of the State are also implicated in the public officials' decision to provide the most efficient, cost effective management of the facility possible. *Hamm v. DeKalb County*, 774 F.2d at 1573.

Petitioner's claim that, unless the Court rejects a state of

mind analysis for conditions cases, "there will be no uniform constitutional standard for the nation," Petitioner's Brief at 24, ignores the fact that all other Eighth Amendment claims require utilization of a state of mind analysis. If Petitioner is suggesting that the Court should adopt specific standards for prison facilities across the nation, this would not only violate the axiom that specific conditions involve considerations "properly [ ] weighed by the legislature and prison administration rather than a court" *Rhodes v. Chapman,* 452 U.S. at 349, but also the admonition that "[n]o static 'test' can exist by which courts determine whether conditions of confinement are cruel and unusual, for the Eighth Amendment 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.' " *Id.* at 346 (quoting *Trop v. Dulles,* 356 U.S. at 101). Indeed, the Court has rejected the use of the American Public Health Association's Standards for Health Services in Correctional Institutions to establish constitutional mandates:

> [W]hile the recommendations of these various groups may be instructive in certain cases, they simply do not establish the constitutional minima; rather they establish goals recommended by the organization in question. For this same reason, the draft recommendations of the Federal Corrections Policy Task Force of the Department of Justice regarding conditions of confinement for pretrial detainees are not determinative of the requirements of the Constitution.

Bell v. Wolfish, 441 U.S. at 543-44 n. 27. *See also Rhodes v. Chapman,* 452 U.S. at 349 n. 13. The American Public Health Association's Standards have again been lodged with the Court for its reference in this case by *amicus curiae* American Public Health Association.

Analysis of conditions cases solely on the basis of objective standards as urged by Petitioner is not possible because unlike statutory punishments for criminal acts, prison conditions are not specifically established by legislative acts. The " 'objective indicia' derived from history, the action of

state legislatures, and the sentencing by juries," *Rhodes v. Chapman,* 452 U.S. at 346-47, do not provide the determinative test necessary for a conditions case.[16]

4. In an Eighth Amendment case, each challenged condition must constitute cruel and unusual punishment

The plethora and variety of Petitioner's complaints (as opposed to focusing on an individual complaint or several specific complaints) indicate Petitioner actually grounds his Eighth Amendment claim on a "totality of the circumstances" theory. Brief of Petitioner at 36-39. Under the "totality of the circumstances" analysis a prisoner claims that, while there is no single condition which causes the prisoner to suffer cruel and unusual punishment, the overall conditions create an atmosphere that causes physical or, more commonly, emotional suffering. Some courts have applied a totality of the circumstances analysis to determine whether overall conditions, when taken in combination, heighten the punishment. Under this analysis, although individual conditions by themselves are not cruel and unusual, the total effect of the conditions renders the punishment cruel and unusual. Totality of the circumstances was incorrectly utilized by the *Rhodes* district court when it reviewed conditions at the Southern Ohio Correctional Facility in 1977:

> The question is constantly stated as one of ascertaining the "totality of the circumstances" of the particular case and then inquiring into whether the totality as determined is intolerant or shocking to the conscience, or barbaric or totally unreasonable in the light of the ever changing modern conscience.

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[16] The *Rhodes* Court did not direct the use of the objective indicia listed in their opinion for a conditions case, it merely used those factors as examples the Court utilized in deciding whether capital punishment for certain crimes met contemporary standards. 452 U.S. at 347.

Chapman v. Rhodes, 434 F.Supp. 1007, 1019 (S.D. Ohio 1977) *aff'd*, 624 F.2d 1099 (6th Cir. 1980), *rev'd*, 452 U.S. 337 (1981).

A totality of the circumstances inquiry involves, to an unjustifiable degree, the subjective judgment of a federal court as to what is intolerable, unreasonable, and shocking to the modern conscience. Applying totality of the circumstances also fails to utilize a traditional Eighth Amendment analysis to examine each individual condition and determine whether punishment is inflicted that is cruel and unusual. The test was implicitly rejected by this Court in *Rhodes* when it reversed the decision of the lower courts.[17]

5. Failing to consider the efforts taken by prison officials to provide for prisoners' basic human needs imposes strict liability

Adoption of Petitioner's argument that the Court should ignore the prison officials' efforts to provide for prisoners' basic human needs and should instead look solely at the conditions in existence at the facility would, in effect, impose strict liability for prison conditions claims. States and prison officials would be subject to claims that they had inflicted "cruel and unusual punishment" on inmates no matter how much effort they undertook to provide adequate living conditions under contemporary standards of human decency. A strict liability type argument was rejected by the Court in *State of Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, and should be rejected for purposes of a prison conditions case.

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[17] In a separate concurring opinion Justices Brennan, Blackmun and Stevens said the language in the majority opinion at 347 indicated the majority utilized a totality of the circumstances test. 452 U.S. at 363 n. 10. However, this is inconsistent with the majority's instructions to use "objective criteria" to the greatest extent possible. See *Hoptowit v. Ray*, 682 F.2d 1237, 1246 n. 3 (9th Cir. 1982) ("In light of the [*Rhodes*] Court's specificity, it is unlikely the Court would hold that the totality of conditions at a prison may constitute an Eighth Amendment violation. The *Rhodes* rationale suggests that the Court would require evidence of specific conditions amounting to one of the enumerated deprivations.")

Petitioner argues in favor of applying what amounts to a strict liability standard for Eighth Amendment conditions cases. This would require prison officials to defend themselves in a trial, from claims for both monetary and injunctive relief, whenever inmates claim the government has failed to meet inmates' basic human needs. This would create enormous barriers to the states' ability to operate their prisons. Brief of Petitioner at 25 n. 23.

These barriers are illustrated by a particularly appropriate hypothetical raised by the United States of the dilemma created by the breakdown of a prison boiler during a cold winter. *See* Brief of the United States as *Amicus Curiae* at 19 n. 16. Whether the condition is a temporary problem that officials have attempted to remedy, or cruel and unusual punishment, can only be determined by examination of the state of mind and actions of the named defendants. Petitioner's proposed standard would subject officials to strict liability for any equipment failure. Consequently, under Petitioner's proposed standard, state officials, despite all good faith efforts to maintain decent living conditions for inmates in their state's detention facilities, face the possibility of successful litigation that reasonably could include damages for actions beyond their control. This result is unquestionably in conflict with this Court's precedents and the basic precepts of the Eighth Amendment.

B. Prison Conditions That Are Not Imposed In A Wanton And Obdurate Manner Do Not Violate The Eighth Amendment Prohibition Against Cruel And Unusual Punishment

Not every governmental action affecting the interests or well being of a prisoner is subject to Eighth Amendment scrutiny. As this Court in *Ingraham v. Wright*, 430 U.S. 651 (1977) stated: "After incarceration, only the ' "unnecessary and wanton infliction of pain" '. . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment." *Id.* 430 U.S. at 670 (quoting *Estelle v. Gamble*, 429 U.S. at 103 and *Gregg v. Georgia*, 428 U.S. at 173). In *Whitley v. Albers*, this Court clarified that underlying the decision in

Estelle v. Gamble was the following understanding of the Cruel and Unusual Punishment Clause: "[t]o be cruel and unusual punishment, conduct that does not purport to be punishment at all must involve more than ordinary lack of due care for the prisoner's interests or safety." *Whitley v. Albers*, 475 U.S. at 319. The Court stated that harsh conditions are part of the price convicts must pay for their offenses against society. *Id.* Not every hardship or harsh act will constitute cruel and unusual punishment. *Rhodes v. Chapman*, 452 U.S. at 347.

1. Where prison officials have provided for inmates' basic human needs prison officials could not have been deliberately indifferent

In *Estelle v. Gamble*, the Court concluded that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' proscribed by the Eighth Amendment." 429 U.S. at 104 (citation omitted). The Court clarified that "an inadvertent failure to provide medical care can not be said to constitute 'an unnecessary and wanton infliction of pain' or to be 'repugnant to the conscience of mankind.' " *Id.* at 105-06.

Even if this Court is inclined to review Petitioner's confinement claims under a deliberate indifference standard, Respondents' actions evidence good faith efforts that unquestionably preclude recovery by Petitioner. (J.A. 40-42, Friend Affidavit), (J.A. 43-44, Patton Affidavit). *See infra* pp. 41-43. Respondents' efforts herein, when compared to *Estelle v. Gamble* (blatant refusal to provide medical care to an inmate who repeatedly complained of a back injury), evidences an absence of behavior that was deliberate or indifferent. Based on the factual record Respondents' actions can not rise to the level cognizable under the Eighth Amendment "deliberate indifference" standard.

2. After *Whitley v. Albers* all Eighth Amendment claims must be evaluated under a wanton and obdurate state of mind standard

Whitley v. Albers marked a new era in Eighth Amendment jurisprudence. The *Whitley* Court clarified that a state of mind analysis governs *all* varieties of Eighth Amendment claims. The *Whitley* Court carefully pointed out:

> [i]t is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause, whether that conduct occurs in connection with establishing *conditions of confinement*, supplying medical needs, or restoring official control over a tumultuous cellblock.

475 U.S. at 319 (emphasis added).[18] In *Whitley* the Court rejected the application of negligence standards to Eighth Amendment claims. "We think the Court of Appeals effectively collapsed the distinction between mere negligence and wanton conduct that we find implicit in the Eighth Amendment. Only if ordinary errors of judgment could make out an Eighth Amendment claim would this evidence create a jury question." *Whitley v. Albers*, 475 U.S. at 322. *See also Daniels v. Williams*, 474 U.S. 327, 328 (1986) ("the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty, or property") (emphasis in original); *Davidson v. Cannon*, 474 U.S. 344, 348 (1986) ("the protections of the Due Process Clause, whether procedural or substantive, are simply not triggered by lack of due care by prison officials").[19]

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[18] Justice O'Connor, joined by Rehnquist C.J., and Kennedy J., subsequently objected to the Second Circuit's attempt to limit *Whitley* to full-blown prison riots. *Stubbs v. Dudley*, 849 F.2d 83 (2d Cir. 1988), *cert. denied*, 489 U.S. 1034, 109 S. Ct. 1095 (1989) (mem.) (O'Connor J., dissenting).

[19] Since "the concerns underlying the Due Process Clause are broader than those underlying the Eighth Amendment," *Davidson v. Cannon*, 474 U.S. at 355 n. 3 (Blackmun J., dissenting), it is clear that if negligence could not state a cause of action under the Due Process Clause, likewise, it could not state a cause of action for any type of Eighth Amendment claim.

3. Wanton and obdurate behavior for Eighth Amendment conditions of confinement claims requires a showing of malice

The question remaining for examination by this Court[20] is whether the Sixth Circuit applied the appropriate standard in reviewing the conditions at HCF. Petitioner spends much time attempting to topple a strawman he has created by mischaracterizing the Sixth Circuit's opinion. Petitioner would have this Court believe that the Sixth Circuit applied the *Whitley v. Albers* "malicious and sadistic for the very purpose of causing harm" analysis when examining the conditions at HCF. Brief of Petitioner at 13-20. The Sixth Circuit actually applied the "obduracy and wantonness" analysis from *Whitley:*

> Initially, it is noteworthy that we have applied *Whitley's* "obduracy and wantonness" standard to eighth amendment challenges to confinement conditions. In *Birrell v. Brown,* 867 F.2d 956 (6th Cir. 1989), we noted that "[i]n addition to producing evidence of seriously inadequate and indecent surroundings, a plaintiff must also establish that the conditions are the result of recklessness by prison officials and not mere negligence or oversight." *Id.* at 958.

Wilson v. Seiter, 893 F.2d at 866 (J.A. 71).

Nowhere in the entire text of the lower Court's opinion does the term "sadistic" appear. The court analyzed the affidavits and counter-affidavits first under *Rhodes v. Chapman* and then under the *Whitley v. Albers* "wantonness and obduracy" standard. In summary the court stated: "Nothing in the appellants' affidavits implies that the appellees used confinement conditions to punish the appellants. To the contrary, the evidence shows action on the appellees' behalf to maintain decent conditions at HCF." *Wilson v. Seiter,* 893 F.2d at 867 (J.A. 73). The court immediately thereafter stated: "Additionally, the *Whitley* standard of obduracy and wantonness requires behavior marked by persistent malicious cruelty." *Id.* Apparently, it is this single sentence that comprises the focus of Petitioner's challenge.

No interpretation of the lower court's opinion can lead to the conclusion that the *Whitley* "malicious and sadistic" standard was utilized in evaluating the conditions at HCF. A more reasonable interpretation of the lower court's decision evidences careful adherence to the *Whitley* "wantonness and obduracy" standard, requiring something less than "malicious and sadistic" and more than mere negligent conduct.

Petitioner argues that there are only two possible approaches to Eighth Amendment claims, the "deliberate indifference" or the "malicious and sadistic" intent standards. Brief of Petitioner at 14-15. This conclusion is unreasonable

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[20] Respondents recognize "[T]he 'decision to grant certiorari represents a commitment of scarce judicial resources with a view to deciding the merits . . . of the questions presented in the petition.' " *City of Canton, Ohio v. Harris,* 109 S. Ct. 1197, 1202 (1989) (citing *St. Louis v. Praprotnik,* 485 U.S. 112 (1988) (quoting *Oklahoma City v. Tuttle,* 471 U.S. 808, 816, *reh'g denied,* 473 U.S. 925 (1985)). However, a careful review of the lower court's opinion reveals that, regardless of the outcome, the parties herein will not be directly affected. The lower court, after reviewing all the evidence concluded: "At best, appellants' claim evidences *negligence* on appellees' parts in implementing standards for maintaining conditions. Negligence, clearly, is inadequate to support an eighth amendment claim." *Wilson v. Seiter,* 893 F.2d at 867 (J.A. 73) (emphasis added).

Since it is clearly established that negligence can not state a claim for violation of the Eighth Amendment, see *supra* p.25, consideration of this issue would amount to an advisory opinion, a result which has consistently been rejected by this Court. *See Webster v. Reproductive Health Services,* 109 S. Ct. 3040, 3050 (1989). This case does not present the Court with the kind of factual basis the Court normally requires as a predicate for adjudication of a novel and serious constitutional issue. *See Estelle v. Gamble,* 429 U.S. at 115 (Stevens, J., dissenting). Consequently, Respondents question whether certiorari has been improvidently granted. *See* Respondents' Brief in Opposition to Certiorari at 18.

in light of the Court's guidance for analyzing Eighth Amendment challenges. In *Rhodes v. Chapman,* 452 U.S. at 345-46, the first conditions case considered by the Court,[21] it was stated that: "The Eighth Amendment, in only three words, imposes the constitutional limitation upon punishments: they cannot be 'cruel and unusual.' The Court has interpreted these words 'in a flexible and dynamic manner,' *Gregg v. Georgia,* 428 U.S. 153, 174 (1976) (joint opinion)." Clearly, the Court intended for the Cruel and Unusual Punishment Clause to be applied in a dynamic and fluid manner.

It is " 'obduracy and wantonness' not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause . . ." *Whitley v. Albers,* 475 U.S. at 319. How the terms "obduracy and wantonness" should be viewed in the context of a prison conditions case has yet to be directly defined by this Court. Petitioner argues that either no state of mind analysis or, alternatively, a "deliberate indifference" standard, should define the standard of review in the prison conditions context. Petitioner advocates application of a "deliberate indifference" standard arguing a supposed lack of security concerns to be weighed by prison officials in conditions cases. Consequently, Petitioner argues, this case should be viewed as more akin to a medical claim that uses "deliberate indifference", than a riot claim that uses a "malicious and sadistic for the very purpose of causing harm" standard. Although this argument has some surface appeal, it fails to recognize that many of the claims comprising conditions challenges inevitably encompass security concerns. *See supra* p. 19.

Typically, the use of "deliberate indifference" to judge the conduct of prison officials has been limited to cases involving

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[21] In *Rhodes v. Chapman,* the Court examined for the first time a dispute over conditions of confinement. 452 U.S. at 345. In the only conditions case previously heard by this Court, *Hutto v. Finney,* the state prison administrators admitted that the conditions constituted cruel and unusual punishment. *Rhodes v. Chapman,* 452 U.S. at 345 n. 11.

personal injury of a physical nature including either failure to protect which has led to injury, or failure to provide medical care to treat a serious medical need which led to injury. In either failure to protect or medical claims the result is a physical injury with concomitant pain. Conditions cases, on the other hand, while they may involve discomfort, do not involve the detriment to bodily integrity, pain, injury, or loss of life typically found in a failure to protect or medical claim. Conditions which are merely unpleasant, even if intensely so, are not subject to Eighth Amendment scrutiny. *Rhodes v. Chapman,* 452 U.S. at 348. A condition of confinement, consequently, should not be elevated to the level of a constitutional question unless it is created or maintained by a prison administrator with malicious intent.

Moreover, application of the "deliberate indifference" standard in a conditions case could easily conflict with two long recognized concepts of the Court. First, "a prison's internal security is peculiarly a matter normally left to the discretion of prison administrators." *Rhodes,* 452 U.S. at 349 n. 14; *Whitley v. Albers,* 475 U.S. at 321. Second, "prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell v. Wolfish,* 441 U.S. at 547.

Prison officials should not be subject to liability under the Eighth Amendment for prison conditions absent a showing of malicious conduct. Malice is a concept that is subsumed within the "obduracy and wantonness" test. The term "wanton" appropriately encompasses a malicious act. It was used for that purpose by the *Whitley* Court, and the definition of "wanton" also incorporates an element of malice:

> Wanton: Reckless, heedless, *malicious,* characterized by extreme recklessness or foolhardiness; recklessly disregardful of the rights or safety of others or of consequences.

Black's Law Dictionary 1582 (6th ed. 1990) (emphasis added).

"Malice," the root word from which "malicious" takes its meaning, has been defined in a legal sense, in recent years to mean:

> Malice: The intentional doing of a wrongful act without just cause or excuse, with an intent to inflict an injury or under circumstances that the law will imply an evil intent. . . .Malice in law is not necessarily personal hate or ill will, but it is that state of mind which is reckless of law and of the legal rights of the citizen.

Black's Law Dictionary 956-57 (6th ed. 1990).

Even if this Court focuses on the statement that "obduracy and wantonness requires behavior marked by *persistent malicious cruelty," Wilson v. Seiter,* 893 F.2d at 867 (J.A. 73) (emphasis added), independent from the balance of the lower court's opinion, this standard serves to strike a needed balance. Conditions of confinement take into account issues that are subjective and open to interpretation. While prisons are traditionally far from luxurious the subjective nature of claims pertaining to conditions of confinement mandate the need for a test giving wide deference to prison officials charged with the responsibility of running a penal facility.

The lower court decided the appropriate analysis, in light of the "wantonness and obduracy" standard, should encompass two essential elements. First, the condition had to be "persistent", reasonably meaning something more than an isolated act or omission. It is reasonable to require more than an isolated act or omission to impose liability in a conditions case.[22] To hold otherwise would permit liability

[22] *See City of Canton, Ohio v. Harris,* 109 S. Ct. 1197, 1210 (1989) (O'Connor J., concurring in part and dissenting in part) ("As the authors of the Ku Klux Klan Act themselves realized, the resources of local government are not inexhaustible. The grave step of shifting of those resources to particular areas where constitutional violations are likely to result through the deterrent power of § 1983 should certainly not be taken on the basis of an isolated incident."). *See also McGhee v. Foltz,* 852 F.2d 876, 880 (6th Cir. 1988) (citing *Withers v. Levine,* 615 F.2d 158, 161 (4th Cir.), *cert. denied,* 449 U.S. 849 (1980)); *Bass v. Jackson,* 790 F.2d 260, 262-63 (2d Cir. 1986); *Woodhous v. Commonwealth of Virginia,* 487 F.2d 889, 890 (4th Cir. 1973).

for an isolated act or omission resulting from "inadvertence" or an "error in good faith" contrary to the holding of *Whitley v. Albers,* 475 U.S. at 319.[23] Second, the condition must result from behavior which was "maliciously cruel." Requiring a showing of a malicious state of mind provides deference to the day to day decision making necessary to allow prison officials to operate a penal facility. These two elements together serve to strike a balance, allowing the court to examine prison officials' behavior in light of their knowledge of deficient conditions, actions taken to cure the deficient conditions, and any barriers to action, financial or otherwise, that would impact on the ability to cure the deficient conditions.

Claims of discomfort cannot state a constitutional deprivation. The Eighth Amendment is not a protection against petty complaints, and prisoners should not be encouraged to use the federal courts as arbiters of grievances that amount only to inconveniences in their living environment. States can forever improve the quality of living conditions by increasing the amount of money spent on a detention facility. However, "a state's decision to maintain at a reasonable level the quality of food, living space, and medical care rather than improve or increase its provisions of those necessities serves a legitimate purpose: to reasonably limit the cost of detention." *Hamm v. DeKalb County,* 774 F.2d at 1573. *See also Wright v. Rushen,* 642 F.2d 1129, 1134 (9th Cir. 1981) (costs often constrain officials' ability to act).

The officials at HCF have provided Petitioner with "the minimal civilized measure of life's necessities" mandated under the Eighth Amendment as evidenced by "the

[23] Some conditions of confinement can *only* rise to the level of cruel and unusual punishment if they are "persistent" and imposed maliciously. For example, deprivation of heat, during the winter, could amount to an Eighth Amendment violation based on the duration and reason for the deprivation. If, however, the deprivation was premised on equipment failure, and was remedied by officials in good faith, no persistence would exist and no liability should be found.

contemporary standard of decency," *Rhodes v. Chapman*, 452 U.S. at 347, and Respondents are not required to provide more. Petitioner has not been denied any basic human necessity upon which an Eighth Amendment claim could be premised. Simply stated, Petitioner is dissatisfied with the living conditions at HCF, in particular with the dormitory style arrangement. But his claims, even if taken as truthful, were properly characterized by the lower court as "[a]t best, . . . evidenc[ing] negligence on appellees' parts in implementing standards for maintaining conditions." *Wilson v. Seiter*, 893 F.2d at 867 (J.A. 73). Both the persistent nature of the complaint and the intent of the state official are necessary and relevant inquiries in a 42 U.S.C. §1983 action.[24]

Petitioner would leave this Court with the impression that three circuits (First, Ninth, and Eleventh) have adopted a

[24] A litigant bringing a post-*Whitley* Eighth Amendment claim must allege acts constituting "obduracy and wantonness" on the part of a governmental official. *Whitley v. Albers*, 475 U.S. at 319. The elements of the cause of action are not conditioned on whether injunctive or damage relief is sought. *Duchesne v. Sugarman*, 566 F.2d 817, 831 (2d Cir. 1977) stated:

> A §1983 plaintiff's burden does not vary depending upon whether he is seeking injunctive or monetary relief; the elements of the cause of action remain precisely the same. In both instances he must prove that the defendant caused him to be subjected to a deprivation of constitutional rights.

Section 1983 was enacted by Congress in 1871 to address intentional acts of violence where "those who represent a state in some capacity were *unable* or *unwilling* to enforce a state law." *Monroe v. Pape*, 365 U.S. 167, 175-76 (1961) (emphasis in original). Thus, from its very inception, the element of some degree of intent has been required to state a §1983 claim. Further, since intent is a necessary element to prove liability in a 42 U.S.C. §1983 action for violation of the Eighth Amendment prohibition on cruel and unusual punishment, whether the action is for damages or injunctive relief, Petitioner's argument that different standards should be applied based on the relief sought must be rejected. Brief of Petitioner at 23 n. 22; Brief of United States as *Amicus Curiae* at 7 n. 3. Moreover, it must be kept in mind that Petitioner herein requests both damages and injunctive relief. (J.A. 8-9, Amended Complaint, VII ¶¶1-6).

"deliberate indifference" standard in reviewing prison conditions cases.[25] Brief of Petitioner at 19-20 & nn. 18-20. Further, Petitioner would lead this Court to believe that the Sixth Circuit applied a standard rejected by five other circuits (Fourth, Fifth, Eighth, Tenth and District of Columbia) in prison condition cases.[26] Brief of Petitioner at 15-19 & nn. 13-17. These statements are based upon a mischaracterization of the lower court's decision and an imprecise reading of the

[25] Petitioner asserts that the First, Ninth, and Eleventh Circuits applied the "deliberate indifference" standard to conditions of confinement cases. Brief of Petitioner at 19 nn. 18-20. However, it is revealing that the cases referred to by Petitioner are primarily not conditions of confinement cases. *See Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556 (1st Cir. 1988), *cert. denied*, 488 U.S. 823 (1988) (psychiatrically disturbed inmate killed after transfer to general population, claim of failure to protect); *Noll v. Carlson*, 809 F.2d 1446 (9th Cir. 1987) (dismissal of *pro se* inmate complaint for failure to protect); *Powell v. Lennon*, 914 F.2d 1459 (11th Cir. 1990) (potential asbestos exposure, medical claim); *Evans v. Dugger*, 908 F.2d 801 (11th Cir. 1990) (paraplegic inmate needing special facilities to accomodate his medical condition, court equivocal about whether to characterize as a medical or conditions claim).

[26] Petitioner argues that the Fourth, Fifth, Eighth, Tenth, and District of Columbia Circuits reject an application of the "malicious and sadistic" standard in a prison conditions context. However, the cases cited from the Eighth, Tenth and District of Columbia Circuits in support of this proposition are not conditions cases. *Wright v. Jones*, 907 F.2d 848 (8th Cir. 1990) (failure to protect case involving an inmate assaulted by another inmate, court applied "reckless disregard of a known risk" standard); *Berry v. City of Muskogee*, 900 F.2d 1489 (10th Cir. 1990) (failure to protect case involving the death of a convict awaiting sentencing); *Morgan v. District of Columbia*, 824 F.2d 1049 (D.C. Cir. 1987) (failure to protect case involving an inmate assaulted by another inmate). The facts in the Fourth Circuit case relied upon by Petitioner, *LaFaut v. Smith*, 834 F.2d 389 (4th Cir. 1987) demonstrate that although the court applied a deliberate indifference standard, the defendant acted "wantonly and obdurately" by intentionally refusing to provide adequate useable toilet facilities for a paraplegic inmate. While the Fifth Circuit in *Foulds v. Corley*, 833 F.2d 52 (5th Cir. 1987) declined to extend the *Whitley* "malicious and sadistic" standard to a conditions case, the Court went on to "apply the now traditional eighth amendment standard: was the infliction of pain 'unnecessary and wanton?' *See, e.g., Whitley*, 475 U.S. at 319." *Foulds*, 833 F.2d at 55.

circuit court cases. The cases relied on by Petitioner in six of the eight circuits are not conditions cases. *See* Brief of Petitioner at 15-19, nn. 13-17.

Upon closer examination of the circuit courts' consideration of Eighth Amendment conditions cases, it is clear that the lower court's use of a "persistent malicious cruelty" standard is not inconsistent with the greater weight of authority. Moreover, the Sixth Circuit is not alone in its extension of a modified *Whitley v. Albers* test to other Eighth Amendment contexts. At least three other circuits have extended the *Whitley* Court's reasoning.

In *Corselli v. Coughlin,* 842 F.2d 23 (2d Cir. 1988) the Second Circuit considered a use of force Eighth Amendment claim. The court applied the *Whitley* standard even though *Whitley* was distinguishable on its facts, since *Corselli* did not involve a full-scale prison riot. "[N]evertheless, the test under *Whitley* applies, that is, 'whether the [prison security] measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on "whether force was applied in a good faith effort to maintain discipline or maliciously and sadistically for the very purpose of causing harm." ' " 842 F.2d at 26 (bracketed material in original) (citing *Whitley,* 475 U.S. at 320-21; *Johnson v. Glick,* 481 F.2d 1028, 1033 (2d Cir.), *cert. denied,* 414 U.S. 1033 (1973)). *See also Stubbs v. Dudley,* 849 F.2d 83 (2d Cir. 1988), *cert. denied,* 489 U.S. 1034, 109 S. Ct. 1095, 1097-98 (1989) (mem.) (O'Connor J. dissenting).

Beyond the use of force context, the Eighth and Eleventh Circuits have extended the *Whitley* analysis to the areas of conditions and compliance with prison rules, respectively. In *Givens v. Jones,* 900 F.2d 1229 (8th Cir. 1990), an inmate claimed that noise and fumes from remodeling were causing him migraine headaches in violation of the Eighth Amendment. The Eighth Circuit, finding no constitutional violation, referred to *Whitley* and stated: "[d]isturbing prison conditions that came about by inadvertence or error in good faith, however, do not constitute constitutional violations, even though the conditions may involve the infliction of

discomfort and pain." *Givens v. Jones,* 900 F.2d at 1234. Moreover, the court proceeded to find: "Givens has not alleged conduct . . . that rose to the level of a constitutional violation. Givens has not claimed that the noise and fumes were the result of *malicious* intent or even reckless disregard for his well being." *Id.* (emphasis added). *See also Holloway v. Lockhart,* 813 F.2d 874, 879 (8th Cir. 1987) (applying *Whitley* "unnecessary and wanton pain and suffering" standard to the use of tear gas to end an occupation of a prison).

In *Ort v. White,* 813 F.2d 318 (11th Cir. 1987) the court considered whether temporary denial of water to an inmate to obtain compliance with work regulations constituted an Eighth Amendment violation. The circuit court affirmed the dismissal of the inmate's complaint and applied the *Whitley* "malicious and sadistic" analysis to this non-riot, non-use of force action.

> Thus, where such immediate coercive action is necessary, the conduct of prison officials does not constitute cruel and unusual punishment within the meaning of the eighth amendment if it was undertaker *not maliciously or sadistically,* but in a good faith effort to restore order or prevent a disturbance, and if the force used was reasonable in relation to the threat of harm or disorder apparent at the time.

813 F.2d at 325 (emphasis added).

The Sixth Circuit defined "wanton and obdurate" in a manner that allows courts to look at whether the conditions at issue are "persistent" or ongoing in nature, rather than an isolated act or isolated omission, and whether the behavior amounts to "malicious cruelty." This test is well founded and supported by the need to examine prison officials' knowledge of the alleged deficient conditions, actions taken to cure the conditions, and any barriers to action that affect the officials' ability to cure the alleged deficient conditions.

The Eighth Amendment is not a basis for broad prison

reform. Inmates can not expect the amenities, conveniences and conditions that one might find desirable. "[T]he Constitution does not mandate comfortable prisons, and prisons . . . which house persons convicted of serious crimes, cannot be free of discomfort." *Rhodes v. Chapman*, 452 U.S. at 349. The Sixth Circuit's use of "persistent malicious cruelty" in reviewing a prison conditions case strikes the needed balance, protecting inmates' constitutional rights, while allowing prison officials flexibility to deal with the practical difficulties of running our nation's prison systems.

II. SUMMARY JUDGMENT WAS PROPERLY GRANTED IN FAVOR OF THE RESPONDENTS.

Deciding cases on summary judgment conserves judicial resources and fosters prompt resolution of disputes. In light of the heavy congestion of cases in the judicial system,[27] summary judgment is an important tool for expeditiously

[27] As the Sixth Circuit has noted: "in recent years an increasingly large number of frivolous cases have been filed in federal court — both by lawyers and *pro se*. Many of these suits waste the time of public officials, lawyers, and the courts. Minimum pleading requirements are needed, even for *pro se* plaintiffs, whose lawsuits now comprise more than 1000 or almost 25% of the appeals filed in this Court." *Wells v. Brown*, 891 F.2d 591, 594 (6th Cir. 1989). *See also* States Attorneys' General Brief of *Amicus Curiae*.

Petitioner is a classic example of a recreational litigator, contributing to the congestion of federal courts. Earlier this year, the Sixth Circuit Court of Appeals noted that Petitioner had filed over 70 appeals since 1976 and that almost all of the filings had either been frivolous or premature. *Pearly Wilson v. George Denton, et al.*, Case Nos. 89-3454 and 89-3978 (6th Cir. March 20, 1990) unreported, *cert. denied*, 110 S. Ct. 2217 (1990), (reproduced in appendix A. 6-10.) In the last two years alone, Petitioner has filed 24 appeals in the Sixth Circuit. *Id.* The Sixth Circuit affirmed a fine under Fed. Rule Civ. P. 11 against Petitioner for abusive conduct and penalized Petitioner by requiring a partial filing fee for all future cases. *Id.* at (A.9). While Petitioner claims that the conditions of confinement created hardships as to "reading, writing and studying," (J.A. 4, Amended Complaint ¶9) his numerous filings would controvert any allegation that conditions at HCF denied Petitioner access to the courts.

resolving those cases in which no genuine issue of material fact exists. "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.' " *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (quoting Fed. Rule Civ. P. 1).

Summary judgment preserves the rights of plaintiffs to have their disputes heard and also, in cases such as this one, enables judges to determine without a trial cases in which no genuine issue of material fact exists.

> Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

Celotex Corp. v. Catrett, 477 U.S. at 327.

Preservation of judicial resouces is even more important for the prompt resolution of Eighth Amendment claims when *pro se* plaintiffs, who are entitled to liberal construction of their pleadings, make conclusory allegations that they have been subjected to cruel and unusual punishment. Courts must be able to fairly and expeditiously determine cases in which there exists no genuine issue of material fact regarding the constitutionality of conditions in a detention facility. Summary judgment acts to preserve the rights of prisoners asserting claims that are adequately based in fact to have access to the courts, and yet still preserves the rights of prison officials to avoid trial of claims that have no factual basis.

It is, therefore, imperative that the elements required to establish a constitutional violation under the Eighth Amendment include an inquiry into the good faith efforts

made by prison officials to provide the prisoner with habitable conditions. It is unavoidable that prison conditions will be objectionable to prisoners. If a prisoner can defeat a motion for summary judgment merely by making conclusory statements by affidavit that mirror a conclusory complaint, while not stating facts substantiating his claim, summary judgment will never be available in a conditions case.

Use of a deliberate indifference standard for a prison conditions case fails to satisfy the goals of promoting judicial efficiency while protecting the rights of all parties to litigation. It is reasonable to hold a prison official to a deliberate indifference standard when examining official actions that actually cause pain or detriment to bodily integrity, *e.g.* lack of medical care or failure to protect claims. However, when an Eighth Amendment claim contests continuing conditions of confinement which inherently involve varying degrees of discomfort and which require discretionary decisions by state officials, the standard for review by a federal court should accord more deference to the prison official. A "persistent malicious cruelty" standard accords the appropriate deference to the prison officials' decision making function in conditions cases which challenge actions which do not cause actual pain. Additionally, this standard promotes judicial efficiency while still preserving the judiciary's duty to protect the constitutional rights of the imprisoned.

Rule 56(c) of the Federal Rules of Civil Procedure provides that a party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." By definition, every lawsuit involves a dispute. To grant summary judgment, a judge must determine whether the dispute involves a "genuine" issue as to a "material" fact. The Court has established that "the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted."

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). To create a "genuine" issue of fact, the evidence must be more than "merely colorable." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 249 (citing *Dombrowski v. Eastland*, 387 U.S. 82 (1967) (per curiam)). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson v. Liberty Lobby Inc.*, 477 U.S. at 252.

To be entitled to summary judgment, Respondent need not negate Petitioner's unsubstantiated claims and immaterial facts. *Celotex Corp. v. Catrett*, 477 U.S. at 323. Just as a court may sua sponte grant summary judgment if claims are factually unsuppported, so may summary judgment be granted without Respondent specifically rebutting each immaterial fact and unsupported claim Petitioner sets forth. *Id.* at 326. Respondent need only "point [ ] out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325.

Here, the boundary of material facts is drawn by the Eighth Amendment to the United States Constitution and the relevant case law. To establish an Eighth Amendment claim of cruel and unusual punishment, a prisoner must allege and prove the following material facts: (1) that the challenged action is punishment, *Bell v. Wolfish*, 441 U.S. 520, *see supra* pp. 9-12, (2) that the punishment seriously deprives the inmate of basic human needs, *Rhodes v. Chapman*, 452 U.S. at 347, *see supra* pp. 13-23, and (3) that the prison officials acted with a wanton and obdurate state of mind. *Whitley v. Albers*, 475 U.S. 312, *see supra* pp. 24-36.

Petitioner presented no facts from which a reasonable jury could infer that the complained of conditions constitute "punishment" prohibited by the Eighth Amendment. All of the complained of conditions are rationally related to legitimate security, administrative and fiscal concerns, or are the inevitable result of the climate conditions affecting all Ohio residents.

Assuming, *arguendo*, that Petitioner had presented evidence to create a genuine issue as to whether the conditions complained of constituted punishment, Petitioner was also required to produce sufficient evidence for a reasonable jury to conclude that the conditions constituted cruel and unusual punishment. To create a genuine issue of fact, Petitioner was required to produce evidence that Respondents failed to provide Petitioner with the "minimal civilized measure of life's necessities." *Rhodes v. Chapman*, 452 U.S. at 347. Petitioner's personal sensibilities do not define the threshold level at which an unpleasant condition becomes a constitutional violation. The Eighth Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." *Rhodes v. Chapman*, 452 U.S. at 346 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)). An Eighth Amendment violation involves more than harsh conditions. *Rhodes v. Chapman*, 452 U.S. at 347-48; *supra* pp 13-14, 24. Petitioner's affidavits contain few allegations of objective facts which support his claim of unconstitutional conditions. The affidavits are replete with conclusory statements such as "inadequate heat," "ventilation is totally inadequate," "extermination is totally inadequate." (J.A. 32-35). These conclusory allegations do not create a genuine issue of fact. The question of genuineness requires Petitioner to show something more than a "metaphysical doubt" about a material fact. *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Petitioner failed to make such a showing here.

Petitioner claims that there are factual disputes as to whether the conditions at HCF provide Petitioner with the minimal civilized measure of life's necessities, precluding summary judgment. Brief of Petitioner at 30-33. Petitioner argues that "[t]he allegations of the petitioner's affidavits, taken together, put in issue whether petitioner has been deprived of the 'minimal civilized measure of life's necessities' with regard to food, sanitation, and shelter under *Rhodes*." *Id.* at 30. By arguing that the conditions were "put in issue," Petitioner seems to be applying a standard applicable to a motion to dismiss, not a motion for summary judgment. To survive a motion for summary judgment, Petitioner must

do more than "put in issue" the conditions; he must show sufficient facts to allow a jury to conclude there was a constitutional violation. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 256-57.

Petitioner argues that it was error for the lower court to dispose of Petitioner's claims of overcrowding, housing with mentally ill inmates, and inadequate cooling on summary judgment because the conditions constitute Eighth Amendment violations when "taken as a whole" or considered under the "totality of the conditions." Brief of Petitioner at 36-39. Petitioner attempts to argue that even if each condition is constitutional when considered alone, they become unconstitutional when taken as a whole. This synergistic argument, that the whole is somehow unconstitutional while the component conditions are not, is inconsistent with the implications of *Rhodes v. Chapman*, *see supra* pp. 21-22, and is not a genuine issue that can preclude summary judgment. To defend against a motion for summary judgment Petitioner was required to produce sufficient evidence on each of the allegedly unconstitutional conditions to permit a reasonable jury to find that the condition denied Petitioner of the minimal civilized measure of life's necessitites. The court of appeals properly found that Petitioner failed to meet this burden on three claims, overcrowding, inadequate cooling, and housing with mentally ill inmates. *Wilson v. Seiter*, 893 F.2d at 865 (J.A. 68-70).

Whether prison officials acted with "obduracy and wantonness" rather than through "inadvertance" or "an error in good faith" is also a material fact which a prisoner must establish to prevail on a claim of cruel and unusual punishment in violation of the Eighth Amendment. *Whitley v. Albers*, 475 U.S. at 319. In response to Respondents' motion for summary judgment, Petitioner was required to produce evidence to raise a genuine issue as to whether Respondents acted obdurately and wantonly. The court of appeals properly applied this analysis. "Having concluded that a showing of obduracy and wantonness is material to appellants' claims, the critical, and determinative, question becomes whether

appellants' affidavits place this fact in issue." *Wilson v. Seiter,* 893 F.2d at 866 (J.A. 70).

The only evidence which Petitioner claims supports his position that Respondents acted obdurately and wantonly are the allegations in Petitioner's affidavit that approximately forty-five days prior to filing his complaint, he sent a letter to Respondents complaining about the conditions of his confinement.[28] The letter recites Petitioner's dissatisfaction with dormitory life at HCF. He complained about "the smoking and body odors of other inmates" (A. 15) and that "the beds at HCF are far too close" (A. 15). Petitioner objected to the institution of the unit management system, which Petitioner claimed "is non-workable." (A. 12-13). Petitioner claims "there is no heating system in 'C' Dormitory." (A. 15). Petitioner alleged he was housed among inmates he claimed were physically and mentally ill, but the letter cites no specific injuries Petitioner or anyone else suffered as a result. The letter contains no complaints whatsoever about unsanitary eating conditions, unclean restrooms, insect infestation, excessive noise or inadequate cooling, allegations which Petitioner subsequently asserted in his lawsuit.

Petitioner alleges that Respondent Seiter did not reply to his letter, but admits Respondent Humphreys responded in writing and referred a copy of the letter to Mr. Friend, the unit manager.[29] (J.A. 32-33, Wilson Affidavit ¶ 3a, 3b). Petitioner claims that the letter is evidence of Respondents'

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[28] A copy of the letter referred to in Petitioner's affidavit as Exhibit 1, along with Exhibits 2 and 3 were not attached to the affidavit as it appears in the Joint Appendix. (J.A. 32-33, Wilson Affidavit ¶ 3, 3a and 3b). All three exhibits are reproduced in the Appendix to the Brief for Respondents. (A. 11-19).

[29] The unit management system used at HCF is "designed to help solve inmate problems and deal with inmate complaints at an individual instead of an institutional level". (J.A. 50). Under this system, each dorm is staffed with three professionals including a social worker and prison official. A member of the team is available twelve hours a day, seven days a week to resolve inmate concerns. (J.A. 50-51).

state of mind because, Petitioner alleges, no action was taken to change the conditions to Petitioner's satisfaction. Brief of Petitioner at 32. This bare allegation that Respondents were informed of some of Petitioner's complaints and that the complaints were not resolved to Petitioner's satisfaction simply does not create a genuine issue of fact as to whether Respondents acted "obdurately and wantonly."

No reasonable jury could find that referring inmate complaints to the unit manager, the individual responsible for dealing with inmate complaints, was evidence of "obdurate and wanton" behavior. In addition, Respondents' affidavits set forth specific good faith efforts that had been previously taken by prison officials in regard to the complained of conditions. Homer Friend, the unit manager, stated in his affidavit that rules are in effect to keep down the noise level, the heaters were recently serviced and are in good working order, the restrooms are completely cleaned twice a day and spot cleaned as needed, and an exterminator is brought into the institution twice each month. (J.A. 40-42).

Petitioner did not submit evidence to contradict any of these specific statements of fact. This uncontroverted evidence of the prison officials' good faith efforts to provide the minimal civilized measure of life's necessities precludes a finding that Respondents' behavior was wanton and obdurate. Summary judgment is appropriately rendered against a party who, like Petitioner, "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. at 322. As the court of appeals found: "appellants' affidavits, in that they fail to raise a reasonable inference of obduracy and wantonness on the appellees' behalf, present no genuine issue as to that material fact." *Wilson v. Seiter,* 893 F.2d at 867 (J.A. 74).

Although evidence of wanton and obdurate conduct necessarily requires evidence of the state of mind of Respondents, merely asserting a claim for which state of

mind is a material element does not preclude summary judgment. In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 255-56, the Court held that summary judgment was properly granted in a libel action brought by a public figure where the plaintiff failed to present evidence that the defendants acted with actual malice. The Court specifically rejected the contention that summary judgment should seldom, if ever, be granted if the defendant's state of mind is at issue.

> Instead, the plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment. This is true even where the evidence is likely to be within the possession of the defendant, as long as the plaintiff has had a full opportunity to conduct discovery.

Anderson v. Liberty Lobby, Inc., 477 U.S. at 257.

Other circuits have held that summary judgment motions were properly granted in cases brought by prisoners where the allegations of unconstitutional conditions of confinement were not supported by evidence of wanton and obdurate conduct by prison officials. In *Harris v. Fleming*, 839 F.2d 1232, 1235 (7th Cir. 1988), the Seventh Circuit affirmed the trial court's grant of summary judgment, stating: "The defendants' temporary neglect of Harris's needs was not intentional, nor did it reach unconstitutional proportions." The Fourth Circuit, in *Ruefly v. Landon*, 825 F.2d 792, 793 (4th Cir. 1987), affirmed a grant of summary judgment because the plaintiff inmate failed to show "that the defendants wantonly and obdurately failed to take precautions for his safety." Similarly, the Tenth Circuit affirmed the dismissal of an inmate's claim of cruel and unusual punishment: "Plaintiff has not shown more than inadvertence or a good faith error by defendants. . . .Plaintiff has not shown that any defendant acted in a wanton or obdurate manner." *Blankenship v. Meachum*, 840 F.2d 741, 742-43 (10th Cir. 1988). *See also Johnson v. Pelker*, 891 F.2d 136, 138 (7th Cir. 1989) (defendant's "indifference" insufficient to state a claim of cruel and unusual punishment).

It is well settled that a "pro se document is to be liberally construed." *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). Even allowing a liberal construction of Petitioner's evidence,[30] however, Petitioner's conclusory allegations were insufficient to defeat Respondents' motion for summary judgment. As this Court recently stated in *Lujan v. National Wildlife Federation*, 110 S. Ct. 3177, 3188 (1990):

> In ruling upon a Rule 56 motion, "a District Court must resolve any factual issues of controversy in favor of the non-moving party" only in the sense that, where the facts specifically averred by that party contradict [material] facts specifically averred by the movant, the motion must be denied. That is a world apart from "assuming" that general averments embrace the "specific facts" needed to sustain the complaint. . . .The object of this provision is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit.

Petitioner's affidavits failed to raise a genuine issue of fact as to whether the complained of conditions constitute punishment, whether the conditions deprive him of the minimal civilized measure of life's necessities, or whether Respondents acted "obdurately and wantonly." The failure to raise a genuine issue of fact as to any one of these three elements is fatal to Petitioner's case. As Petitioner failed to raise a genuine issue of material fact as to all of the three elements, summary judgment was properly granted.

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[30] While courts give liberal construction to the pleadings of *pro se* litigants, a *pro se* party must still set forth facts sufficient to withstand summary judgment. *Vigliotto v. Terry*, 873 F.2d 1201, 1203 (9th Cir. 1989) ("No valid interest is served by withholding summary judgment on a complaint that wraps nonactionable conduct in a jacket woven of legal conclusions and hyperbole.")

CONCLUSION

For all of the aforementioned reasons, this Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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DECEMBER 19, 1990

APPENDIX TO BRIEF FOR RESPONDENTS

THE CONSTITUTION OF THE UNITED STATES OF AMERICA

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

* * *

OHIO REVISED CODE § 9.86

Civil immunity of officers and employees; exceptions.

Except for civil actions that arise out of the operation of a motor vehicle and civil actions in which the state is the plaintiff, no officer or employee shall be liable in any civil action that arises under the law of this state for damage or injury caused in the performance of his duties, unless the officer's or employee's actions were manifestly outside the scope of his employment or official responsibilities, or unless the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

This section does not eliminate, limit, or reduce any immunity from civil liability that is conferred upon an officer or employee by any other provision of the Revised Code or by case law. This section does not affect the liability of the state in an action filed against the state in the court of claims pursuant to Chapter 2743. of the Revised Code.

* * *

RULES OF THE SUPREME COURT OF THE UNITED STATES

PART III - JURISDICTION ON WRIT OF CERTIORARI

Rule 14

CONTENT OF THE PETITION FOR A WRIT OF CERTIORARI

.1. The petition for a writ of certiorari shall contain, in the order here indicated:

(a) The questions presented for review, expressed in the terms and circumstances of the case, but without unnecessary detail. The questions should be short and concise and should not be argumentative or repetitious. They must be set forth on the first page following the cover with no other information appearing on that page. The statement of any question presented will be deemed to comprise every subsidiary question fairly included therein. Only the questions set forth in the petition, or fairly included therein, will be considered by the Court.

* * *

FEDERAL RULES OF CIVIL PROCEDURE

RULE 1. SCOPE OF RULES

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

[Amended effective October 20, 1949; July 1, 1966.]

* * *

RULE 11. SIGNING OF PLEADINGS, MOTIONS, AND OTHER PAPERS; SANCTIONS

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harrass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

[Amended effective August 1, 1983; August 1, 1987.]

* * *

RULE 56. SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixing for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment if appropriate, shall be entered against the adverse party.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

[Amended effective March 19, 1948; July 1, 1963; August 1, 1987.]

* * *

Nos. 89-3454, 89-3978

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

PEARLY L. WILSON,	)	
	)	On Appeal
Plaintiff-Appellant,	)	from the United
	)	States District
v.	)	Court for the
	)	Southern
GEORGE F. DENTON, ET AL.,	)	District of Ohio
	)	
Defendants-Appellees.	)	

Decided and Filed March 20, 1990

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. This notice is to be prominently displayed if this decision is reproduced.

Before GUY and BOGGS, Circuit Judges, and GADOLA, District Judge.*

Pearly Wilson is a pro se Ohio prisoner who appeals the district court's denial of a motion for relief from judgment that he filed under Fed. R. Civ. P. 60(b). Wilson also appeals the district court's assessment of sanctions against him under

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* Honorable Paul V. Gadola, United States District Judge for the Eastern District of Michigan, sitting by designation.

Fed. R. Civ. P. 11. These appeals have been consolidated and Wilson's case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination of the record and the briefs, the panel unanimously agrees that oral argument is not needed in this case. Fed. R. App. P. 34(a).

In 1976, Wilson initiated a prison conditions suit under 42 U.S.C. § 1983. In 1979, the district court entered a consent decree that resolved all of the issues in the case except one. Wilson's claim that he was entitled to damages because he had not received proper medical care for an injury to his hand was severed from the rest of the case. On August 6, 1985, the district court granted the defendants' motion for summary judgment on this issue. This court affirmed that judgment on October 31, 1986, and the United States Supreme Court denied Wilson's petition for certiorari on February 23, 1987.

Wilson then filed a motion to alter or amend the judgment under Fed. R. Civ. P. 60(b)(6). On March 31, 1988, the district court entered an order that denied Wilson's motion. At that time, the court also denied the defendants' motion for Rule 11 sanctions. This court affirmed the district court's order on October 19, 1988 and denied Wilson's motion for reconsideration on December 9, 1988. The Supreme Court denied certiorari on February 21, 1989.

Wilson then filed his second motion under Rule 60(b). The defendants again moved for sanctions and, on May 17, 1989, the district court entered an order that denied Wilson's motion and granted the defendants' motion for sanctions under Rule 11. The court subsequently ordered Wilson to pay the defendants $200.00 for their attorney's fees. It is from these orders that Wilson now appeals.

The district court properly denied Wilson's most recent motion under Rule 60(b)(3) and (b)(6). First, Wilson's allegation of fraud under section (b)(3) was not made within one year of the date of judgment as required by the rule. See *Wood v. McEwen,* 644 F.2d 797, 801 (9th Cir. 1981), *cert. denied,*

455 U.S. 942 (1982). Moreover, there is nothing in the record to suggest that there was a fraud upon the court. Wilson's argument that he did not authorize the settlement of his damage claims misapprehends the procedural history of his case. These claims were severed by the district court more than a year before the entry of the consent decree pursuant to an amicus curiae motion that was filed by the U.S. Department of Justice. The agreed order that was signed by counsel after the consent decree preserved Wilson's right to proceed with his case and restricted the defendants' ability to object to Wilson's evidence on the ground that it related to the issues that had been adjudicated by the decree. The entry of this order evidences careful lawyering on Wilson's behalf rather than fraud.

Nevertheless, the district court granted the defendants' motion for summary judgment because it found that the uncontroverted facts simply did not support Wilson's claim for damages. That decision has been extensively reviewed by the district court and by this court as well. The Supreme Court has twice declined further review of this claim. Under these circumstances, it cannot be said that the district court abused its discretion in denying Wilson's second motion under Rule 60(b).

Moreover, it was appropriate for the district court to assess sanctions of $200.00 in this case under Fed. R. Civ. P. 11. In reviewing the imposition of Rule 11 sanctions, this court looks "to see whether the district court judge abused his discretion in finding plaintiff's conduct to have been unreasonable under the circumstances." *LeMaster v. United States*, 891 F.2d 115, 118 (6th Cir. 1989). It was not an abuse of discretion for the district court to impose sanctions against Wilson for attempting to relitigate his claim for damages when that issue had repeatedly been decided against him. *Cf. Patterson v. Aiken*, 841 F.2d 386, 387 (11th Cir. 1988); *Hewitt v. Sperl*, 798 F.2d 1230, 1233 (9th Cir. 1986). In addition, the record belies Wilson's argument that sanctions were imposed because the judge was biased. Indeed, the district court denied the defendants' first motion under Rule 11 even though sanctions might already have been appropriate at

that time.

In dismissing an unrelated case, a different judge was compelled to observe that "Wilson's habitual filing informa (sic) pauperis in federal court constitutes an abuse of process." *Wilson v. American Tobacco Co.*, Nos. C2-87-1069/C2-87-1075/C2-87-1219 (S.D. Ohio, Sept. 20, 1989). Our own records indicate that Wilson has filed over 70 cases with this court since 1976. At least 24 of those cases have been filed in the last two years. Almost all of these filings have been either frivolous or premature.

Requiring Wilson to pay a partial filing fee may discourage frivolous litigation in the future. Several other circuits have considered this issue and have decided that the payment of partial fees was appropriate under similar circumstances. *See In re Epps*, 888 F.2d 964, 967 (2d Cir. 1989) (citing *In re Williamson*, 786 F.2d 1336, 1339-41 (8th Cir. 1986); *Collier v. Tatum*, 722 F.2d 653, 655 (11th Cir. 1983); *Bullock v. Suomela*, 710 F.2d 102, 103 (3rd Cir. 1983); *Smith v. Martinez*, 706 F.2d 572, 574 (5th Cir. 1983); *Evans v. Croom*, 650 F.2d 521, 522-23 (4th Cir. 1981), *cert. denied*, 454 U.S. 1153 (1982); *cf. Zaun v. Dobbin*, 628 F.2d 990, 993 (7th Cir. 1980) (non-prisoner, pro se litigants)). In addition, separate panels of our own court have recently issued unpublished orders which required partial filing fees from at least two other abusive litigants. *Bond v. Hood*, No. 89-5841 (6th Cir. Nov. 21, 1989); *May v. Warner Amex Cable Communications*, Nos. 88-3802/88-4029 (6th Cir. Feb. 28, 1989).

Wilson's most recent in forma pauperis applications indicate that the balance of his prison account fluctuates between fifty cents and five dollars. Therefore a $3.00 filing fee would encourage Wilson to be appropriately selective in his future litigation without creating a de facto bar to his access to the court. Wilson is also advised that his ability to proceed in forma pauperis may be further restricted if he continues to file frivolous cases in this court. *See Maxberry v. S.E.C.*, 879 F.2d 222, 224 (6th Cir. 1989).

Accordingly, Wilson's request for counsel is hereby denied

and the district court's order is affirmed because the allegations in Wilson's second motion for post judgment relief are untimely, repetitious and substantively without merit. The district court's imposition of Rule 11 sanctions was reasonable and is affirmed for these same reasons. Rule 9(b)(5), Rules of the Sixth Circuit. In addition, the Clerk is directed to require a partial filing fee of $3.00 from Wilson in each appeal or original action that he files in this court in the future.

* * *

EXHIBIT 1: Wilson Affidavit (J.A. 32)

Pearly L. Wilson, #146-097
Hocking Correctional Facility
Post Office Box 59
Nelsonville, Ohio 45764

July 8, 1986

Mr. Richard P. Seiter, Director, Department of Rehabilitation and Corrections - 1050 Freeway Drive, North - Columbus, Ohio 43229;

-and-

Mr. Superintendent Carl Humphreys
Hocking Correctional Facility
17659 Snake Hollow Road
Post Office Box 59
Nelsonville, Ohio 45764

Dear Mrs Seiter and Humphreys:

I am bringing to your personal attentions the following conditions of confinement to which you are subjecting me and requesting that same be corrected at once.

1st: You have me warehoused at the Hocking Correctional Facility at Nelsonville, Ohio with both severe mentally and physically ill inmates, and close proximity which subjects me to cruel and unusual punishment.

2nd: The number of medical staff members, both in the medical and psychiatric department, as well as the psycological department, are not adequately staffed to ensure the care and attention for these ill men above mentioned.

3rd: These dormitories at this Facility, (hereinafter designated as "HCF"), are overcrowded and completely unsanitary and does not further the prison's goals or policies legitimately.

(a) nor does the overcrowding meet the standards of correctional association and public health association's requirements and is an immediate and sure danger to the health of every inmate at HCF. Being warehoused like this is definitely not a part of the penalty imposed upon me by the courts of the State of Ohio. Gentlemen, the close proximity, such as it is here, can and will lead to increased incidences of contagious diseases and a severe breakdown of the immune system of not only myself, but every man at this Facility. The negative effects of open dormitory living has caused mental stress far too severe to measure to any reasonable degree and can only be corrected to satisfaction by a reduction of the present population at HCF.

(b) You have warehoused here, inmates who have been operated on at various hospitals; returned to HCF; and lie here with open sores. These men have been discharged from the Infirmary at HCF far too soon because of the small area and lack of space in which to care for these mens' (sic) medical needs in and at the Infirmary. I refer to inmates who wear the bags for urinating and defacating since it is impossible for them to do so in a normal fashion after their operations. And, it must be brought to your personal attentions that these men cleanse these bags, etc., in the sinks and toilets in the dormitories. This should not be permitted. There should be a special place for that particular purpose. Most of these men know nothing about personal hygiene, nor do they care.

4th: You now have what id (sic) cased or called a "Unit Management" thing; based upon the federal "Unit Management" which failed in the federal system. It

is beyond my comprehension as to why this was instituted at HCF. However, the so-called "Unit Management" at HCF is non-workable. And it is my duty to advise you that:

(a): you have personnel operating the so-called Unit Management who are totally unqualified to do so; having no prior training in that department or area;

(b): these personnel have access to prisoners' criminal and medical records; lacking training in either department or area; and, to top that off, it has been brought to our attentions that these untrained personnel will make recommendations to the Adult Parole Authority regarding our chances for paroles, etc.

(c): Such as listed above is brutal misclassifications of inmates by untrained personnel. Many prisoners at HCF suffer from ranges of mild to severe mental impairments, yet, openly confined with the general population. Many prisoners suffer from a broad range of mental problems; some psychotic, others are victims of early brain damage/injury, and all are incapable of functioning in a normal prison environment. Same of which inflicts cruel and unusual punishment in contravention of my rights under the Eighth Amendment.

(d): Be advised that not a single guard, not a single medical nurse, nor *any* of your personnel at HCF is trained in dealing with these men who have these mental problems and it results in unnecessary and wanton infliction of pain upon not only myself, but all the other normal inmates at HCF.

(e): the very placing of well-intentioned guards in the position of dealing with inmates who are mentally ill without training or adequate guidance, results in the infliction of cruel and unusual punishment upon all inmates at HCF.

Be further advised that the Supreme Court of the United States has set forth the goals of penal confinement by the states in our criminal justice system: "To punish justly, to deter future crime, and to return imprisoned persons to society with an improved change (sic) of being useful, law abiding citizens. *Rhodes v. Chapman,* 452 U.S. 337, 101 S.Ct. 2392, 2402 (1981). These men should be in the least restrictive environments. But you really have us warehoused without proper classifications, etc.

It has always been my contention, gentlemen, that the transfer of myself from the Chillicothe Correctional Institute at Chillicothe, Ohio, was for the sole purpose of punishment of myself because of the various lawsuits filed in courts against State of Ohio prison officials, and I must advise you that this is, and has always been true. Not speculated.

Be advised that I do not intend to permit passive negligence be the claim by either of you gentlemen if these subjections are not corrected forthwith. I cannot allow my mentality to do what is plainly intended: digress by degrees, at your hands because you do not care as to how we are confined at this Facility. . . . or with whom.

5th: Because of the alleged sex offense crime which I have been convicted of, you do not any longer permit sex offenders to be furloughed; although you have already furloughed several sex offenders from HCF. This is a blatant denial of equal protection of the laws, gentlemen. And I have been confined well more than ten (10) years and there is not a single incidence of a sex violation on my record at any facility wherein I have been confined. My institution record speaks for me.

6th: At HCF there is completely inadequate ventilation even though every one of the windows are open. This is a dead area where HCF is situated. No air or oxygen comes through these windows sufficient to be healthy. . . . whatwith the close proximity of these diseased prisoners here who have lung problems and hardly any hygienic training.

(a): The smoking and body odors of other inmates is horrible, to say the least.

7th: In winter, there is no heating system in "C" Dormitory. This has been like so since this Facility has been opened in 1983. I will also bring to your attention that there is insufficient clothing given these men for winter since there is no heating system in the dormitory listed. Such is an infliction of cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution.

8th: The beds at HCF are far too close for a healthy environment; being that so many of these inmates are with lung diseases and other physical impairments which could be communicated to another prisoner against his will and without his knowledge.

I shall await your response to these conditions listed by me above and certainly request, again, that every listed violation be corrected forthwith. In the event that no changes are made within a reasonable time, be advised that I shall be forced to file a lawsuit against you and all prison personnel involved in these unhealthy conditions and cruel and unusual punishment imposed upon me without cause or justification.

Sincerely,

/s/ Pearly L. Wilson

PEARLY L. WILSON

* * *

EXHIBIT 2: Wilson Affidavit (J.A. 32-33)

* SENDER: Complete items 1, 2, 3 and 4.

Put your address in the "RETURN TO" space on the reversable side. Failure to do this will prevent this card from being returned to you. The return receipt fee will provide you the name of the person delivered to and the date of delivery. For additional fees the following services are available. Consult postmaster for fees and check box(es) for service(s) requested.

1. [ ] Show to whom, date and address of delivery.

2. [ ] Restricted Delivery.

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3. Article Addressed to:

Richard P. Seiter, Director
Dept. Rehabilitation & Corrections
1050 Freeway Drive, North
Columbus, Ohio 43229

---

4. Type of Service Article Number

[ ] Registered [ ] Insured /s/ P 678 311 646
[ ] Certified [ ] COD
[ ] Express Mail

Always obtain signature of addressee or agent and DATE DELIVERED.

---

5. Signature - Addressee

X _____

6. Signature - Agent

X /s/ R. Campbell

7. Date of Delivery

/s/ 7/14/86

8. Addressee's Address (ONLY if requested and fee paid)

PS FORM 3811, July 1983 447-845
Domestic Return Receipt

* * *

EXHIBIT 3: Wilson Affidavit (J.A. 33)

* SENDER: Complete items 1, 2, 3 and 4.

Put your address in the "RETURN TO" space on the reversable side. Failure to do this will prevent this card from being returned to you. The return receipt fee will provide you the name of the person delivered to and the date of delivery. For additional fees the following services are available. Consult postmaster for fees and check box(es) for service(s) requested.

1. [ ] Show to whom, date and address of delivery.

2. [ ] Restricted Delivery.

---

3. Article Addressed to:

Supt. Carl Humphreys
Hocking Correctional Facility
P.O. Box 59
Nelsonville, Ohio 45764

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4. Type of Service Article Number

[ ] Registered [ ] Insured /s/ P 678 311 645
[ ] Certified [ ] COD
[ ] Express Mail

Always obtain signature of addressee or agent and DATE DELIVERED.

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5. Signature - Addressee

X _____

6. Signature - Agent

X /s/ Melissa J. Burch

7. Date of Delivery

/s/ 7/11/86

8. Addressee's Address (ONLY if requested and fee paid)

PS FORM 3811, July 1983 447-845
Domestic Return Receipt

* * *